No. 01-417

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

The Brief for the Petitioner sets out the opinions below, the basis for this Court's jurisdiction, and the statute involved. Pet. Br. at 1-2.

STATEMENT OF THE CASE

The *certiorari* petition in this case raises the following Question Presented:

> Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement? [Pet. i.]

That "right to appeal" question arises out of a declaratory judgment class action lawsuit by Robert A. Scardelletti, *et al.*, as trustees of the Transportation Communications International Union Staff Retirement Plan against George DeBarr and Anthony Santoro, Sr., individually and as representatives of two separate subclasses; the class action settlement therein; and the District Court's approval of that settlement. The Court of Appeals succinctly and accurately stated the nature of the underlying class action case and of the relevant proceedings in the District Court. In the first regard the Court of Appeals stated:

> The Transportation Communications International Union (TCU) is a labor union representing approximately 85,000 employees, mostly in the railroad and service industries. The Plan is a defined benefits pension plan that covers TCU's officers and employees. In October 1990, the former trustees recommended that the Plan be amended to add a COLA adjustment equal to the increase in the COLA index for every three years after a participant's retirement. As a result of the

amendment, which became effective on January 1, 1991, the existing retirees received increases in their pensions based upon the number of years they had been retired.

In late 1991, TCU elected new officers and selected the new trustees to replace the former trustees. In 1993, however, it was revealed that the former trustees had relied upon an incorrect valuation of the Plan's liabilities in deciding to enact the COLA amendment and that enactment of the COLA amendment had increased the Plan's liabilities by approximately $20 million. The new trustees believed that they could not rescind the COLA benefits across the board because, under ERISA, they were prohibited from amending the Plan to reduce accrued benefits. *See* 29 U.S.C.A. § 1054(g)(1) (providing that accrued benefits "may not be decreased by amendment of the plan"). Accordingly, they amended the Plan to "freeze the COLA as it pertain[ed] to the future service accrual for active employees," . . ., thereby "eliminating COLA increases based on future service under the Plan." . . . The amendment did not, however, eliminate the COLA benefits for participants who were retired as of January 1, 1991.

In January 1995, the new trustees filed suit against the former trustees in the United States District Court for the District of Maryland seeking damages and an equitable decree declaring the COLA amendment void as a product of fiduciary breaches. *See Scardelletti v. Bobo*, 897 F.Supp. 913 (D.Md. 1995); *Scardelletti v. Bobo*, No. JFM-95-52 (D.Md. Sept.8, 1997). The district court found in favor of the new trustees, agreeing that the former trustees had breached their fiduciary duties. The district court also concluded that the 1991 COLA benefit was not an accrued benefit for pre-1991 retirees such as Devlin because it had not been received prior to their

retirement.[6] In accordance with the district court's decision, the new trustees amended the Plan and rescinded the COLA for participants who had retired prior to January 1, 1991 (the 1997 amendment).

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[6] The district court originally concluded that the COLA benefit was an accrued benefit for pre 1991 retirees. *See Scardelletti v. Bobo*, 897 F. Supp. 913, 916 (D.Md. 1995). As noted above, accrued benefits generally cannot be eliminated by amendments to the plan. *See* 29 U.S.C.A. § 1054(g)(1). The district court, with little elaboration and presumably relying upon § 1054(g), stated that "[u]nfortunately, the current trustees are caught between a rock and a hard place to remedy this situation because ERISA prohibits amendments of the Plan repealing an automatic COLA." *Bobo*, 897 F. Supp. at 916. It later reconsidered, however, stating that "if an employee works with the expectation that she is earning, and will receive, a pension benefit, an employer may not later decide not to give her the benefit that it has promised and she has earned. In the present case, Plan participants who retired prior to 1991 did not work with the expectation that they would receive a COLA. Thus, the COLA was not an accrued benefit." *See Scardelletti v. Bobo*, No. JFM-95-52, at 18-19 (D.Md. Sept.8, 1997).

[Pet. App. A4-A6 (citations and other footnotes omitted).]

With regard to the proceedings in the class action case, the Court of Appeals added:

> On October 14, 1997, the new trustees filed the present action as a class action in anticipation of challenges to the 1997 amendment, seeking a declaration that the 1997 amendment was binding on all Plan participants or, in the alternative, that the 1991 COLA amendment was void as to all participants. The new trustees' original complaint named Devlin as a class representative for the Retiree Subclass because he previously had been active in challenging the new trustees' efforts to eliminate the COLA benefits. Devlin, however, refused to accept the position. The new trustees, therefore, named a new representative for the Retiree Subclass, Anthony Santoro.

On February 9, 1999, the [D]istrict [C]ourt for the District of Maryland conditionally certified the class pursuant to Federal Rule of Civil Procedure 23(b)(1) and divided it into two subclasses: those who would benefit from the removal of COLA (the Active Subclass), and those who would benefit from the retention of COLA (the Retiree Subclass). In May 1999, with the assistance of a magistrate judge, the new trustees and the class representatives agreed upon a settlement under which the COLA benefits would be eliminated in exchange for certain other benefits. Under the proposed settlement, it was agreed that the [D]istrict [C]ourt would enter a consent order declaring the 1991 COLA benefit void at its inception.

In the meantime, Devlin and four other retirees were pursuing actions in the Southern District of New York alleging claims under the ADEA and ERISA against TCU relating to their death benefits and medical benefits. They also included a claim relating to the 1997 Amendment, arguing that the 1997 Amendment was motivated by age discrimination. *See Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121, 126 (2d Cir. 1999). On April 13, 1999, the Second Circuit affirmed the Southern District of New York's dismissal of Devlin's COLA claim, stating that "[t]he exact COLA issue that the appellants are pursuing ... is being addressed by the district court in Maryland.... It seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue . . . ."

Shortly after the Court of Appeals for the Second Circuit affirmed the dismissal of Devlin's challenge to the 1997 Amendment, Devlin became interested in the class action pending in the [D]istrict [C]ourt in Maryland. On April 20, 1999, Devlin's counsel sent a letter to the [D]istrict [C]ourt informally seeking to intervene in the class action. On May 12, 1999, Devlin sent another letter through counsel to the [D]istrict [C]ourt repeating his informal request to intervene and

informing the [D]istrict [C]ourt that Devlin was "still await[ing] a response from Your Honor." . . . For whatever reason, Devlin did not formally move to intervene, nor did he take any further action to follow up on these letters, until September 1999.

On August 27, 1999, the Trustees filed a motion for preliminary approval of the settlement in the District of Maryland. On September 10, 1999, Devlin finally sought leave to intervene pursuant to Federal Rule of Civil Procedure 24(a) and (b). At the November 12, 1999 fairness hearing, the [D]istrict [C]ourt denied Devlin's motion to intervene as "absolutely untimely." . . . It then examined the considerations leading to the settlement, heard Devlin's objections, and approved the settlement. [Pet. App. A7-A9 (citations and footnotes omitted).]

On appeal to the Fourth Circuit, Petitioner made two separate "right to appeal" arguments. Petitioner's first argument was "that he was entitled to intervene before the [D]istrict [C]ourt under Federal Rule of Civil Procedure 24(a) and (b) to challenge the settlement," Pet. App. A4, and "that the [D]istrict [C]ourt erred in denying his motion to intervene," *id.* A10. And, Petitioner's second argument was "that even if the [D]istrict [C]ourt properly denied his motion to intervene, he is nevertheless entitled to appeal from the [D]istrict [C]ourt's final order approving the settlement," *id.* A4, in that "he has standing to challenge the settlement by virtue of his objections at the fairness hearing and his unsuccessful attempt to intervene, *id.* A14.

The Fourth Circuit unanimously rejected Petitioner's appeal of the District Court order denying his motion to intervene. *See* Pet. App. A10-A14 (Part II of Court of Appeals' opinion), A30 (Michael, J., concurring in that Part II ruling). The Fourth Circuit then went on, by a 2-1 vote, to reject Petitioner's second argument—that his right to appeal could

be based solely on his status as an objector to the settlement. *See id.* A14-24 (Part III of Court of Appeals' opinion), A30-34 (Michael, J., dissenting from that Part III ruling).

SUMMARY OF ARGUMENT

In *Karcher v. May*, 484 U.S. 72 (1987), and *Marino v. Ortiz*, 484 U.S. 301 (1988), this Court reaffirmed and applied the well-settled general rule that only parties have a right to appeal from an adverse final judgment. *Infra* pp. 9-10. Petitioner makes two arguments as to why he *is* a "party" for purposes of the *Karcher/Marino* "right to appeal" rule—both of which are wrong.

1. (a) At the most basic level, the persons who are the parties who litigate a federal court case are the named plaintiff(s), the named defendant(s), and the persons who become named parties by intervention, substitution, or third-party practice. Beyond that, federal court cases can generate ancillary legal disputes/ancillary proceedings in which a third person is the movant or the respondent and an adverse district court ruling runs against, and directly binds, that third person as an individual. In that situation, this Court has recognized in, *e.g.*, *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), that the third person movant/respondent in the ancillary proceeding who is subjected to an adverse final order/judgment in that proceeding is a party with a right to take an appeal therefrom. *Infra* pp. 10-14.

(b) Petitioner's main "party" theory—which invokes *Blossom v. Milwaukee Railroad, supra*, and the thin line of like cases in this Court—is that *every* individual member of a properly-certified class in a Rule 23 class action case is "a party directly bound by an adverse judgment" in the case with a right to appeal therefrom. But the *Blossom* rationale and result are of no aid to Petitioner.

On first principles of the law of judgments, the *only* individual members of a certified class who are "parties directly bound by the judgment" in a Rule 23 class action case are the named representative parties who appear—either originally or through intervention, substitution or third-party practice—to litigate the claim(s)/defense(s) set out in their complaint/answer. In contrast, as the Court most recently explained in *Richards v. Jefferson County*, 517 U.S. 793 (1996), there is a "general consensus 'in Anglo-American jurisprudence'" that persons—including the numerous persons who are members of a certified class in a Rule 23 class action—who have *not* appeared on their own behalf to litigate their own claim(s)/defense(s) are "'*not* bound by a judgment *in personam*.'" *Id.* at 798 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (emphasis added). Such persons are bound solely because, and to the extent that, they are members of a class that has been fairly and adequately represented by the named representative parties to the case. *Infra* pp. 14-18.

All of Petitioner's attempts to show otherwise through snippets of language drawn from various opinions of this Court in the class action context do nothing to put those principles into question. *Infra* pp. 18-22.

It is also to the point that Petitioner's theory—which transmutes a class action from one commenced and litigated in the district court by a representative party to one commenced and litigated in the court of appeals by as many of the represented class members as choose to take an appeal—is entirely inconsistent with, and destructive of, the very purpose of the Rule 23 process for the fair and effective litigation of class action cases. *Infra* pp. 22-24.

2. Petitioner's secondary "party" theory is that in a Rule 23 class action case those class members who make a timely objection to a proposed settlement are, on that basis, "parties to the case" with a right to appeal the judgment approving the settlement.

(a) This argument cannot be squared with this Court's holding in *Marino v. Ortiz, supra*, that persons who presented their objections to a proposed settlement of a Title VII class action case but did not intervene in the case "were *not* parties to the underlying [class action] lawsuit" with a right to appeal from the judgment approving the settlement. 484 U.S. at 304 (emphasis added). *Infra* pp. 25-26.

Petitioner fails in his attempt to distinguish *Marino* on the ground that class members who present objections to a proposed class action settlement do so "as a matter of *right*, pursuant to Rule 23(e)," whereas non-class-members (like the objectors in *Marino*) who present objections to such a settlement do so "as a matter of [judicial] grace." Pet. Br. at 19 (emphasis in original). There is nothing in Rule 23 (including the cited Rule 23(e)), or in any other Federal Rule, providing that class members who present objections to a proposed settlement of a class action case become "parties to the case," but that other objectors do not. *Infra* pp. 26-27.

(b) Nor is there any substance to the suggestion, implicit in Petitioner's Question Presented, that even if a class member does *not* become a party to the case by making an objection to the approval of a class action settlement, a class member does become a party by making an objection *and* moving to intervene. *Infra* p. 28.

3. Petitioner's subtext is that without regard to whether objecting class members are parties on one or both of his "party" theories, there are sound policy reasons for allowing appeals by objecting class members from district court judgments approving class action settlements. This suggestion for re-writing the "right to appeal" rule is fundamentally unsound.

(a) The *Karcher/Marino* rule—and its corollary here that only third persons who have become parties to a class action through Rule 24 intervention have the right to appeal from a judgment approving a settlement of that action—has

the benefits of formal precision and a high degree of certainty that are particularly desirable in a rule of civil procedure; Petitioner's suggested policy standard does not. *Infra* pp. 28-29.

(b) Petitioner bottoms his policy argument on the proposition that the procedure for becoming a party to a class action case afforded those who object to a proposed settlement—a Rule 24 motion to intervene—is unduly burdensome. But that is not so. A Rule 24 intervention requirement imposes at most a minimal burden on objecting class members, as against the far greater burden on an appellant inherent in the taking of and prosecution of an appeal from the approval of a class action settlement. And, by any measure, the benefits of an intervention requirement in this context more than balances that minimal burden. *Infra* pp. 29-33.

4. Petitioner also seeks to raise the question of whether the District Court's denial of Petitioner's motion to intervene and the Court of Appeals' unanimous affirmance of that denial were in error. But that question is *not* the single question set out in the *certiorari* petition nor a question fairly included therein, and is therefore *not* a question before this Court. *Infra* pp. 33-36.

ARGUMENT

I. PETITIONER'S "PARTY WITH A RIGHT TO APPEAL" ARGUMENTS

In *Karcher v. May*, 484 U.S. 72, 77 (1987), the Court reaffirmed the "consistently applied . . . general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." And, in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), the Court added:

> The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. *See, e.g., United States ex rel.*

Louisiana v. Jack, 244 U.S. 397, 402 (1917); Fed. Rule App. Proc. 3(c) ("The notice of appeal shall specify the party or parties taking the appeal").

Petitioner makes two claims to a party status that supports a right to appeal the District Court judgment approving the class action settlement in this case.

First, and foremost, Petitioner argues that as a member of a certified class in this Rule 23 Fed. R. Civ. P. class action case, he is "a party directly bound by the judgment" approving the settlement with the right to appeal that judgment.

Second, Petitioner argues that as a class member who, on the publication of notice of the proposed settlement, made a timely objection to the settlement, he is, on that basis, "a party to the case" with the right to appeal the judgment approving the settlement.[1]

Neither of Petitioner's "party" theories is sound. Accordingly, under *Karcher* and *Marino*, Petitioner has no right to appeal from the District Court judgment in this case.

A. Party Status

At the most basic level, the persons who are parties to a federal court case are:

(i) the named plaintiff(s) who initiate the lawsuit through a complaint, and who are entitled to pursue the claim(s) stated therein in the manner provided in the Federal Rules;

(ii) the named defendant(s) who are properly served with the complaint, and who are entitled to state and maintain defense(s) to the plaintiff(s)' claim(s) in the manner provided for in the Federal Rules; and

[1] To simplify the terminology used here, the "subclass" of retirees of which Petitioner is a member will be referred to (as in Petitioner's brief) as a "class." *See* Fed. R. Civ. P. 23(c)(4).

(iii) "[o]ne who is not an original party to [the] lawsuit," but who, in the manner provided for in the Federal Rules, "become[s] a party by intervention, substitution, or third-party practice," *Karcher*, 484 U.S. at 77, and who is entitled to pursue her legal position in the manner provided for in the Federal Rules.

To the foregoing, Petitioner would add:

> Under this Court's settled precedents, "party" status for purposes of the right to appeal is not limited to individually identified or "*named*" parties to a case, as some courts assume. Instead, appellate "party" status extends to all persons over whom a district court exercises jurisdiction, who are directly bound by a final order or judgment of that court, and hence who are "parties" to the particular final decision from which they appeal. [Pet. Br. at 17 (emphasis in original) (footnote omitted).]

It is not intuitively obvious that the term "party" encompasses a person who is not a "'*named*' part[y] to a case." *Id.* (emphasis in original). But lawsuits between the named parties to a case can and do generate ancillary legal disputes/ancillary proceedings in which: (i) a third person is the movant or the respondent (like a named plaintiff/named defendant in the underlying lawsuit); and (ii) an adverse district court ruling runs against, and directly binds, that third person as an individual (like a dispositive ruling for/against a named party in the underlying lawsuit). And, in that situation, this Court has recognized that the third person (like a named party subject to an adverse final order/judgment) is a party with a right to take an appeal from the adverse final order/judgment in the ancillary proceeding that runs against and directly binds that person as an individual.[2] The Court has done so in the following cases:

[2] While we agree with Petitioner on the basic point of the cited cases, we disagree that those cases constitute "[t]wo general lines of precedents."

(i) *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), recognizing the right of a bidder on foreclosed-upon property—not a named party to the original foreclosure action—to appeal from the district court's order denying the bidder's petition claiming a legal entitlement to the property, *see* Pet. Br. at 20-21;

(ii) *Hinckley v. Gilman, Clinton, & Springfield Railroad Co.*, 94 U.S. 467 (1876), recognizing the right of a court-appointed receiver—not a named party to the original foreclosure action—to appeal from the district court's order requiring the receiver to pay money into the court registry, *see* Pet. Br. at 18; and

(iii) *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988), recognizing the right of third person witnesses, not named parties to the case, to appeal from a contempt citation entered by the district court against the witnesses for noncompliance with subpoenas served upon them by a named party to the case, *see* Pet. Br. at 22.[3]

Pet. Br. at 20. Insofar as we can discern, there is a single line of cases stemming from *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863).

[3] Beyond the three cases noted in text, two of the cases Petitioner cites as *Blossom* "progeny," *see* Pet. Br. at 21 n.7, do rely on *Blossom*'s reasoning, albeit in treating not with an appellant's right to appeal but in rejecting an appellee's claim that because the appellee was not a named party to the underlying lawsuit no appeal will lie. *See Minnesota Co. v. St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1865) (Rejecting the argument of an appellee bidder on foreclosed-upon property that an appeal from a district court judgment in the bidder's favor in an ancillary proceeding precipitated by the bidder arising out of an original foreclosure action did not lie because the bidder was not a named party to the original action. The bidder in *St. Paul* was a party to the ancillary proceeding resulting in a judgment in that bidder's *favor* just as the bidder in *Blossom* was a party to the ancillary proceeding resulting in a judgment *against* the bidder there); *Hovey v. McDonald*, 109 U.S. 150, 155-56 (1883) (Rejecting the argument of an appellee receiver that an appeal from a district court judgment in the receiver's favor in an ancillary proceeding arising out of an original foreclosure action did not lie because the receiver was not a named party to the original action. The receiver was a party to the ancillary proceeding resulting in a judgment in the receiver's *favor* just as the receiver in *Hinckley* was a party to the ancillary proceeding resulting in a judgment *against* the receiver there).

In our view, none of Petitioner's other cases is a *Blossom* "progeny." While Petitioner cites *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Sage v. Railroad*, 96 U.S. 712 (1878), *see* Pet. Br. at 21 n.7, neither is in point. *Trustees v. Greenough* does not even cite *Blossom*, and is part of "*Blossom*'s progeny," if at all, only to the extent that it follows *sub silentio* the Court's ruling on the altogether separate "finality" issue presented in *Blossom* (and not presented here). *Sage* does cite *Blossom*, but only on the "finality" issue, *see* 96 U.S. at 714, it being undisputed that the appellants before the Court "had been admitted as defendants in the suit" and as named parties were parties for purposes of the appeal, *id.* at 713.

Petitioner also cites *Williams* v. *Morgan*, 111 U.S. 684 (1884), which he describes as a case in which "this Court held that a district court order approving fees for a trustee could be appealed by objectors who had appeared in the trial court *but had not formally intervened.*" Pet. Br. at 21 (emphasis added). But that misdescribes *Williams*, which involved an appeal by two individuals who *had formally intervened* and were thus parties. *See* 111 U.S. at 696 ("As to the right of Williams and Thomason to appeal, this depends on their *right to intervene* . . . or rather on the power of the court to allow them to do so. . . . Williams and Thomas jointly, presented, as we have seen, formal applications to be heard before the master and the court. . . . The court very properly, as it seems to us, *granted their application.*") (emphasis added).

Johnson v. Manhattan Railway Co., 289 U.S. 479 (1933)—cited not by Petitioner but by one of his supporting *amici*, *see* Brief of *Amicus Curiae* Council of Institutional Investors at 25—is most fairly read as a decision noting a highly unusual variation on the *Williams* intervention theme. In a decision antedating the Federal Rules of Civil Procedure, the *Johnson* Court approved the dismissal of a second suit on preclusion grounds. In *dictum*, the Court opined that the shareholders who brought and/or intervened in the second suit in order to object to the conditions of a

Neither the holdings nor the reasoning of the decisions in this thin *Blossom* line of authority provides support for Petitioner's claim that he is a party with a right to appeal from the judgment here—as we now show.

B. Petitioner's "Party Directly Bound By The Judgment" Theory

Petitioner's main "party" theory—that in a Rule 23 class action case "members of a properly certified class . . . are 'parties' directly bound by the judgment" in the case, Pet. Br. at 2—is plainly and simply wrong.

The only class members who are parties to a Rule 23 class action case are those members of the class who "sue or [are] sued *as representative parties*," Fed. R. Civ. P. 23(a) (emphasis added), and those named representative parties are the only class members who are "parties directly bound by the judgment" in the case.[4] The additional numerous persons who are members of the class are *not* parties to the case and are *not* "parties directly bound by the judgment" in the case. This conclusion is buttressed by the Federal Rules, the theory of representative actions and the principles of *in personam* judgments.

1. The Federal Rules set the same basic terms for the conduct of Rule 23 class action cases as for other civil actions litigated in federal court. And, under the Federal Rules—as the Rules have long stood and currently stand—only those

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receivership imposed on their company in the first suit would have been entitled "to intervene as parties in the [first] suit" under former Equity Rule 37, and could have appealed in that suit if their objections had been denied. *See* 289 U.S. at 495-96. In the course of this brief discussion, the Court did not elaborate on the required intervention procedure.

[4] In addition, as we have indicated, a person is a party if that person has in the manner provided for in the Federal Rules been duly permitted to intervene or substitute as a named representative party, either for general purposes or for purposes of taking an appeal. *See also infra* pp. 29-33.

class members who "sue or [are] sued as representative parties" have the rights, spelled out in the Rules, to personally appear to litigate the claim(s)/defense(s) set out in their complaint/answer. For example, only the named representative parties, and not any of the other class members, have the right to take or obtain discovery in support of their asserted claim(s)/defense(s).[5] Likewise, only the named representative parties, and not any of the other class members, have the right to move for summary judgment in the case or to defend against a motion for summary judgment.[6]

Given that the named representative parties to a Rule 23 class action case are the only class members who appear to litigate the claim(s)/defense(s) set out in their complaint/answer, it necessarily follows that only those named

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[5] *See, e.g.*, Fed. R. Civ. P. 30(a)(1) ("A party may take the testimony of any person, including a party, by deposition."); Fed. R. Civ. P. 31(a)(1) ("A party may take the testimony of any person, including a party, by deposition upon written questions."); Fed. R. Civ. P. 33(a) ("[A]ny party may serve upon any other party written interrogatories"); Fed. R. Civ. P. 34(a) ("Any party may serve on any other party a request . . . [for] designated documents."); Fed. R. Civ. P. 36(a) ("A party may serve upon any other party a written request for . . . admission[s]."); Fed. R. Civ. P. 45(a)(3) ("The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service."). With respect to the *discretionary* decisions of some district courts to allow limited discovery by objectors to a proposed class action settlement who have not been accorded party status, see p. 27 n.14 *infra*.

[6] *See, e.g.*, Fed. R. Civ. P. 56(a) ("A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may . . . move . . . for a summary judgment in the party's favor upon all or any part thereof."); Fed. R. Civ. P. 56(b) ("A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may . . . move . . . for a summary judgment in the party's favor as to all or any part thereof."); Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may . . . respon[d].").

representatives are "parties directly bound by the judgment" in the case disposing of those claims/defenses. The named representatives are the parties asserting or defending against a claim and it is the named representatives as parties who are bound by the judgment. *See* Restatement (Second) of Judgments § 34(2), at 345 (1982) ("A party is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party."). *See also id.* § 42 comment g, at 412 ("A person who appears in his own behalf in litigation has had his day in court and is bound by the judgment.").

In contrast, as the Court most recently explained in *Richards v. Jefferson County*, 517 U.S. 793 (1996), there is a "general consensus 'in Anglo-American jurisprudence'" that persons—including the numerous persons who are members of a certified class in a Rule 23 class action—who have *not* appeared on their own behalf to litigate their own claim(s)/defense(s) are "'*not* bound by a judgment *in personam*.'" *Id.* at 798 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (emphasis added).[7]

We hasten to add that the foregoing proposition—that only the named representative parties in a Rule 23 class action case are "parties directly bound by the judgment" in the case and that the many other individual class members are not so bound—most emphatically does *not* mean that the judgment does not extend to the certified class as a class entity or that the judgment has no preclusive effect on those other individual class members. But the preclusive effect on the individual class members derives from the status of those members as part of the class that is bound as the result of a judgment obtained by or against the named representative parties.

[7] *Richards* did not itself involve the binding effect of a judgment in a class action case, but in discussing the constitutional limits of preclusion, the Court discussed the nature of class actions at some length.

As *Richards* makes clear, the law of judgments "do[es] not always require one to have been a party to the judgment in order to be bound by it." 517 U.S. at 798. To the contrary, and "[m]ost notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Id.* To take the example pertinent here,

> as [the Court] explained in [*Martin v.*] *Wilks*[, 490 U.S. 755, 762 n.2 (1989)]: "We have recognized an exception to the general rule when, in certain limited circumstances, a person, *although not a party*, has his interests adequately represented by someone with the same interests who is a party. *See Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940) ('class' or 'representative' suits); Fed. Rule Civ. Proc. 23 (same). . . ." [517 U.S. at 798-99 (emphasis added).]

It bears emphasis that the preclusive effect of an adverse judgment on persons who are parties thereto is not the same as its effect on persons who are in privity with the parties to the judgment. As we have shown, an adverse judgment in a Rule 23 class action case operates directly and automatically to extinguish the claim(s)/defense(s) of the named representative parties as "part[ies] to [the] judgment." *Richards*, 517 U.S. at 798. On the other hand, under the "privity" rule, the judgment extinguishes the claim(s)/defense(s) of the represented class members if, but only if, the class member, "'although not a party, has [had] his interests adequately represented by someone with the same interests who [was] a party.'" *Id.* (quoting *Wilks*, 490 U.S. at 762 n.2).

Indeed, as *Hansberry v. Lee* holds, where the named representative parties in a class action case do *not* adequately represent the interests of the other class members, it violates due process to accord an adverse judgment in that case *res judicata* effect against those other class members. *See* 311 U.S. at 42-43 ("[T]h[e] members of a class not present as parties to the litigation may be bound by the judgment,"

consistent with due process of law, only "where they are in fact adequately represented by parties who are present."). In that situation, then, the class action judgment does extinguish the named representative parties' claim(s)/defense(s), but does *not* extinguish the other class members' claim(s)/defense(s).

2. (a) In arguing that represented class members are "parties directly bound by the judgment" in the class action case, Petitioner places great albeit misplaced reliance on statements regarding the preclusive effect of class action judgments in *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996); and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Pet. Br. at 24-26. Petitioner sums up its case discussion by quoting *Shutts* for the proposition that "'[t]he *absent parties* would be bound by the decree so long as the *named parties* adequately represented the absent class and the prosecution of the litigation was within the common interest.'" Pet. Br. at 25 (quoting 472 U.S. at 808) (emphasis by Petitioner).[8]

Petitioner's main "party" theory, however, does *not* rest on the proposition stated in *Hansberry v. Lee* and summarized in *Shutts* that the "privity" rule extends a judgment's preclusive effect to properly represented third persons who are *not* "parties directly bound by the judgment." Rather, the theory rests on the quite different proposition that all represented

[8] *See also* Pet. Br. at 24-25 (quoting *Smith v. Swormstedt*, 57 U.S. at 303, for the proposition that under "the English rule . . . a court of equity could permit 'a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the Court.'"); Pet. Br. at 25 (quoting *Matsushita*, 516 U.S. at 379, for the proposition that "[u]nder current practice, 'all members of the class, whether of a plaintiff or defendant-class, are bound by the judgment entered in the action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion.'").

class members *are* "parties directly bound by the judgment" in a class action case. *Richards*, *Wilks* and *Hansberry v. Lee* reject that quite different proposition in the clearest possible terms. And, nothing in *Smith v. Swormstedt*, *Matsushita*, *Shutts* or, so far as we are aware, any other decision of this Court, embraces it.

(b) Petitioner likewise fails in his effort to make something of the Court's references in *Shutts*, *Hansberry v. Lee*, and other decisions to represented class members in a class action case as "absent parties" or "parties in interest." *See* Pet. Br. at 25-26.

None of the cited decisions (nor any other decision of the Court that we have been able to find) refers to represented class members as "parties directly bound by the judgment" in a class action case, or suggests that an "absent party" to a class action case or a "party in interest" thereto is a "party directly bound by the judgment" in the case.

The *Hansberry v. Lee* opinion cuts squarely against any such equation. The opinion begins by denoting the petitioners as persons that the court below had held "bound by a judgment rendered in an earlier litigation *to which they were not parties*." 311 U.S. at 37 (emphasis added). And, the opinion goes on to state the "'class' or 'representative' suit" exception to the principle of *Pennoyer v. Neff*, 95 U.S. 714 (1878), to be that "the judgment in [the suit], to which some members of the class are parties, may bind members of the class or those represented *who were not made parties to it*." *Id.* at 40-41 (emphasis added).

Indeed, *Hansberry v. Lee*'s due process holding rests on the fundamental *distinction* in the law of judgments between: (i) named representative parties in a class action case who appear to litigate their claim(s)/defense(s) and who *are* "parties directly bound by the judgment," and (ii) represented class members who do not appear to litigate their own

claim(s)/defense(s) and who are bound by the judgment only as members of a class and only if their interests have been adequately represented by the named representative parties.

Against that background, the Court's references to "absent parties" or "parties in interest" are most fairly read as shorthand for "persons whose legal situation is such as to put them in privity with the named representative parties in a class action case so long as those named representative parties have adequately represented the absent class members' interests"—not as shorthand for "persons who are parties directly bound by the judgment in a class action case."

(c) Petitioner goes on to argue that "[t]his Court's precedents addressing mootness issues in the context of class actions similarly support the conclusion that every class member is a 'party' in a properly certified class action." Pet. Br. at 26. Petitioner cites in particular *Sosna v. Iowa*, 419 U.S. 393 (1975), and this Court's statement therein that "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the] appellant [class representative]." Pet. Br. at 26 (quoting 419 U.S. at 399) (brackets by Petitioner). Again, Petitioner's argument is without merit. The *Sosna* line of decisions lends added support to our position.

The *Sosna* Court did *not* state, or even imply, that *each individual person* who is a member of a certified class acquires a separate "legal status" upon class certification—much less *a "party" status*. To the contrary, what the *Sosna* Court said is that upon class certification "*the class of unnamed persons*" *as a class entity* acquires a separate "legal status." 419 U.S. at 399 (emphasis added). As the Court added in *Kremens v. Bartley*, 431 U.S. 119 (1977), under *Sosna* and its progeny "it is only a 'properly certified' *class* that may succeed to the adversary position of a named

representative whose claim becomes moot." *Id.* at 132-33 (emphasis added) (citing *Indianapolis Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975)).

Indeed, Petitioner's reading of *Sosna* would lead to absurd results that *Kremens v. Bartley* makes clear were not intended by the *Sosna* Court. Under Petitioner's reading, when the named representative party's individual claim in a certified class action case becomes moot, any one of the "unnamed persons" who is a member of the certified class with a live claim (or any number of those persons) is entitled to assume the role of the named representative party who litigates the claims therein, without any regard to whether that person is a proper named representative party who "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

Under *Kremens v. Bartley*, however, what is required in these circumstances in order to avoid a declaration of mootness of the class action case is the proper "substitution of class representatives with live claims." 431 U.S. at 135. Substitution of new class representative parties would be entirely unnecessary in this context, of course, if all "unnamed persons" who are members of the certified class were already "parties" with the litigation rights attendant to party status.[9]

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[9] Petitioner also relies, to no avail, upon the *Sosna* Court's statement that class certification has "important consequences" because "[i]f the suit proceeds to judgment on the merits, it is contemplated that the decision will bind all persons who have been found at the time of the certification to be members of the class." Pet. Br. at 26 (quoting 419 U.S. at 399 n.8). This Court's precedents undoubtedly do "contemplate" that where the named representative party provides fair and adequate representation to the class the judgment in a class action case will be binding on all members of the certified class. But as we have shown, that is because of the rule making judgments in representative actions—including class

(d) Petitioner fares no better in his argument that "[t]he same logic" under which the Court of Appeals (without discussion or analysis) recognized Petitioner's right to appeal both "the [D]istrict [C]ourt's denial of his motion to intervene" and "the [D]istrict [C]ourt's entry of an injunction against him," supports Petitioner's right to appeal the District Court judgment approving the class action settlement. Pet. Br. at 27. In both the instances Petitioner cites, his appeal arose out of an ancillary proceeding in this Rule 23 class action case initiated by Petitioner as an individual, or brought against Petitioner as an individual, that generated a District Court ruling and final order that ran directly against, and directly bound, Petitioner as an individual.

In both instances, then, under *Blossom v. Milwaukee Railroad*, *supra*, Petitioner was "a party directly bound by the [final orders]" running against him, with a right to appeal therefrom. In contrast, as we have shown, neither Petitioner nor any of the other represented individual class members in this case is "a party directly bound by the judgment" approving the class action settlement here.[10]

3. The short of the matter is that Petitioner's "party directly bound by the judgment" theory has no basis in the law. And, while that is dispositive, it is worthy of note that Petitioner's theory—which transmutes a class action from one commenced and litigated in the district court by a representative party to one commenced and litigated in the

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actions—binding on properly represented third persons, and *not* because every member of a certified class is "a party directly bound by the judgment" in the class action case.

[10] As indicated above, represented class members are bound by a class action judgment only because, and to the extent that, they are members of a class that has been adequately represented by the named representative parties. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913 (1998) (developing this aspect of the nature of class actions).

court of appeals by as many of the represented class members as choose to take an appeal—is entirely inconsistent with, and destructive of, the very purpose of the Rule 23 process for the fair and effective litigation of class action cases. As the Eleventh Circuit aptly put it in *Guthrie v. Evans*, 815 F.2d 626, 629 (11th Cir. 1987):

> A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. . . . A class cannot even be certified unless its members are so numerous that joinder is impracticable. Fed.R.Civ.P. 23(a)(1). If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court would defeat the very purpose of class action lawsuits.[11]

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[11] Citing empirical data purporting to show a relative paucity of "objector appeals" from the approval of class action settlements during the 1971-2000 period, *Amicus Curiae* Council for Institutional Investors argues that the concerns stated by the *Guthrie* court are misplaced, and that "[i]n fact, mandating intervention would impose *more* work on the federal courts, not less." Brief of *Amicus Curiae* Council of Institutional Investors at 21 (emphasis in original). This argument suffers from several flaws.

First, Petitioner's "party directly bound by the judgment" theory would allow not only "objector appeals" from the approval of class action settlements, but also non-party-class-member appeals from adverse final judgments *in fully-adjudicated class action cases* (of which *Guthrie* itself was one). Thus, in offering empirical data on "objector appeals" from the approval of class action settlements, the Council of Institutional Investors has not even begun to come to grips with the manageability problems that likely would be created by acceptance of Petitioner's theory.

Second, whatever this empirical data may indicate on its own narrow terms with respect to the past (and we do not even know whether the data treats comprehensively with the whole range of reported and unreported judicial action in the settlement context), that data is an ineffective

Indeed, Petitioner's theory extends by necessary implication to various other forms of representative litigation that are as well-recognized and accepted in the law as is class action litigation, and that generate judgments that generally have the same preclusive effect on absent represented persons in privity with the named representative party as do judgments rendered in class action litigation: *e.g.*, litigation by a trustee on behalf of the beneficiaries of a trust, *see, e.g.*, *Richards*, *supra*, 517 U.S. at 798; litigation by a labor union or other unincorporated association on behalf of its members, *see, e.g.*, *Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992); and *parens patriae* litigation by the government on behalf of its citizens, *see, e.g.*, *New York v. Reebok Int'l Ltd.*, 96 F.3d 44 (2d Cir. 1996). *See also generally* 18 Wright, Miller & Cooper, Federal Practice & Procedure, §§ 4454-60 (2d ed. 1991).

Petitioner's theory, then, is equally inconsistent with, and equally destructive of, the very purpose of these various other well-recognized forms of representative litigation.[12]

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harbinger of the future, as the class action is still in its formative stages with respect to a wide range of potential litigation. Indeed, the result in the case at bar may serve as a focal point in determining the future of the class action as an effective technique for the resolution of large-scale disputes.

Third, whatever burden is placed on the federal courts (and would-be intervenors) by a mandatory intervention requirement is more than offset by the benefits of that requirement, both in the settlement context, *see infra* pp. 29-33, and in the non-settlement context, *see Guthrie*.

[12] Showing obvious discomfort with the necessary implications of his theory, Petitioner suggests that—at least in the specific context of a class action case that is resolved by a district-court-approved settlement—"party" status for purposes of an appeal can and should be limited to those represented persons who themselves have taken some action in the district court to "preserve[ ] the arguments they seek to raise" on appeal. Pet. Br. at 13. That suggestion makes no analytical sense.

C. Petitioner's "Party To The Case" Theory

Petitioner's secondary argument is that in a Rule 23 class action case those individual class members who, on the publication of notice of a proposed settlement of the case, make a timely objection to that settlement, are, on that basis, "parties to the case" with a right to appeal the judgment approving the settlement. This "right to appeal" theory, while considerably narrower than Petitioner's main theory, is just as clearly wrong.

1. Petitioner's second theory cannot be squared with this Court's holding in *Marino v. Ortiz*, *supra*. In that Title VII class action lawsuit brought by minority police officers against the City of New York, white police officers—who were not members of the class and who had not intervened, but whose interests were affected by a proposed settlement of the class action case—first "*presented their objections* to the District Court at the hearing" on the proposed

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The general rule barring appellate consideration of arguments not "preserved" in the court below might properly be invoked to limit the scope of the arguments that would be open on an otherwise proper appeal from a final judgment in representative litigation—where, for example, arguments sought to be raised on appeal have not been made in the court below by *any* representative party or member of the represented group, thus denying the opposing party a fair opportunity to be heard on the point. *See generally Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

But we do not see how that general rule could properly be invoked to deny an appeal outright if in fact the represented person taking the appeal is "a party directly bound by the judgment" in the case. The threshold issue of the *right* to appeal is quite distinct from the issue of the proper *scope* of any appeal that is permitted, and that threshold issue must be disposed of on its own terms before the latter issue even comes into play. *See generally* 15A Wright, Miller & Cooper, Federal Practice & Procedure, § 3902.1, at 123-24 (2d ed. 1991) ("The conclusion that [certain] non[-named]-parties should be able to appeal does not of itself determine the scope of the arguments that should be open on appeal.").

settlement, and then sought to appeal from the judgment approving the settlement. 484 U.S. at 303 (emphasis added).

The *Marino* Court held that the objecting white police officers "were *not* parties to the underlying lawsuit" with a right to appeal from the judgment approving the settlement. *Id.* at 304 (emphasis added). Under *Marino*, then, a person not otherwise a party to a class action case does not become a party to the case by making and pursuing an objection to the approval of a proposed settlement of the case.

What the Eighth Circuit said of *Marino* in *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), is eminently correct:

> The Supreme Court [in *Marino*] was referring to officers who had filed objections to the settlement [there], and whose counsel was allowed to speak at the hearing and argue against the proposed settlement. . . . While they were not unnamed class members, they were in a position similar to the [unnamed class member appellant in the case before this Circuit] in that they were objecting to the approval of a settlement of the class action. . . . *Marino* [thus] provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so.[13]

2. Petitioner would distinguish *Marino* on the ground that class members who present objections to a proposed class action settlement do so "as a matter of *right*, pursuant to Rule 23(e)," whereas non-class-members who present

[13] *See also Felzen v. Andreas*, 134 F.3d 873, 874 (7th Cir. 1998), *aff'd by equally divided court sub nom., California Pub. Employees' Retirement Sys. v. Felzen*, 525 U.S. 315 (1999) ("[T]he Supreme Court held [in *Marino*] that a person adversely affected by the settlement of a class action may appeal from the consent decree based on that settlement only if he has intervened as a party.").

objections to such a settlement do so "as a matter of [judicial] grace." Pet. Br. at 19 (emphasis in original). But that distinction has no bearing on the question of "party" status.

There is nothing in Rule 23 (including the cited Rule 23(e)), or in any other Federal Rule, providing that class members who present objections to a proposed settlement of a class action case are "parties to the case"—just as there is nothing in Rule 23, or in any other Federal Rule, providing that non-class-member objectors are parties. To the contrary, the Federal Rules point *both* class member objectors *and* non-class-member objectors to a specific procedure by which they can become "parties to the case," and that specific procedure is Rule 24 intervention.

To be sure, the distinction between class members who have the right to object to a proposed class action settlement and non-class-members who do not have such a right may well be relevant to the issue of intervention, inasmuch as Rule 24 on its face distinguishes between intervention "of [r]ight" and "[p]ermissive" intervention. But nothing in the Federal Rules renders such a distinction relevant to the altogether different issue of whether *non*-intervenor objectors to a proposed class action settlement are "parties to the case" by reason of having made an objection.[14]

[14] Aside from his "objection as of right" theory, Petitioner argues that it is "implicit in the fact that absent class members are often allowed discovery into the justification for a class settlement" that class members are parties to a class action case. Pet. Br. at 28 n.14. But of course, if objecting class members were parties to a class action case, the class members would have a right to take discovery. Thus, district court actions, in the exercise of their sound discretion, to "allow discovery into the justification for a class settlement," *id.*—given Rule 23(d)'s grant of authority to such courts to "make appropriate orders . . . determining the course of [the class action's] proceedings . . . [and] dealing with similar procedural matters"—do not remotely imply that class members are parties to a class action case.

3. Petitioner's phrasing of his Question Presented—which speaks of the right to appeal of a "class member who . . . objects *and moves to intervene* . . ."—suggests that it is Petitioner's position that even if a class member does *not* become a party to the case by making an objection to the approval of a class action settlement, a class member does become a party by making an objection *and* moving to intervene.

In his brief, however, Petitioner presents no argument for the proposition that a class member's filing of a Rule 24 motion to intervene—in conjunction with the filing of an objection to a proposed class action or in itself—is a legal act that makes the class member a party to the case.

It therefore suffices, we believe, to point out that the filing of a Rule 24 motion to intervene, like the filing of any motion, is an act whose legal significance is determined by a judicial order disposing of the motion. If that motion is denied, the movant remains a person who is *not* a party to the case. There is thus no substance to the implied suggestion that the mere filing of a motion to intervene can in any circumstance make a class member a party to a class action case.

II. PETITIONER'S POLICY ARGUMENTS

Petitioner's legal text is that *all* class members in a Rule 23 class action case are "parties directly bound by a judgment" approving a settlement with a right to appeal therefrom, or, alternatively, that those class members who *object* to a proposed settlement are "parties to the case" with the right to appeal from a judgment approving the settlement. That text, as we have shown, is an incorrect statement of the law.

Petitioner's subtext is that without regard to whether they are parties, class members who object to a proposed settlement of a Rule 23 class action case should be deemed to have a right to appeal from a district court approval of the

settlement. The theme of this subtext is that because appellate review of district court approval of class action settlements is desirable, and because objecting class members are persons interested in and affected by the case, it is undesirable to limit the right of appeal to those who have become parties to the class action case through the Rule 24 intervention process.

This suggestion for re-writing the "right to appeal" rule is fundamentally unsound.

(A) The *Karcher/Marino* rule—and its corollary here that only third persons who have become parties to a class action through Rule 24 intervention have the right to appeal from a judgment approving a settlement of that action—has the benefits of formal precision and a high degree of certainty that are particularly desirable in a rule of civil procedure. As Judge Easterbrook has noted:

> Observance of form has benefits, such as a reduction in uncertainty and the costs that uncertainty breeds. [In the present context,] [i]ntervention identifies with precision who is entitled to take what procedural steps, and when. [*In re Navigant Consulting, Inc. Securities Litigation*, 275 F.3d 616, 620 (7th Cir. 2001).]

Conversely, a standard that bases a non-party's right to appeal on such vague notions as an assessment of the non-party's interests and/or on the costs and benefits of allowing an appeal by the non-party is one that calls for the kind of inherently complex and inherently imprecise calculus of imponderables that breeds uncertainty.

(B) In the final analysis, Petitioner's claim that the *Karcher/Marino* rule is too narrow rests on the assertion that the Rule 24 intervention process places too great a burden on class members who wish to appeal a district court judgment approving a class action settlement. This undue burden argument is a hollow one. Since taking and pursuing an

appeal requires infinitely more time, effort and resources than does submission of a Rule 24 intervention motion, the claim that the intervention process is an obstacle that would preclude, or even give serious pause to, a person who would otherwise pursue an appeal does not ring true.

Indeed, Petitioner's undue burden argument rests in large part on exaggeration of what the Rule 24 intervention process requires of an objecting class member in the context of a proposed settlement of a Rule 23 class action case. In this regard, Petitioner and his *amici curiae* emphasize the supposed difficulties of intervention *before* a proposed settlement of a class action case is reached. *See* Pet. Br. at 36-37; Brief of *Amicus Curiae* Council of Institutional Investors at 11-12. *But see* 1966 Advisory Committee Notes on Rule 24. However, in the normal course, *after* a proposed settlement has been reached, the intervention process is straightforward and in no way taxing.

Once a proposed settlement is reached, it is axiomatic that the named representative party who has negotiated the settlement does *not* adequately represent either the interests or the viewpoint of those class members opposed to the settlement. Thus, it should in the normal course be a relatively simple matter for an objecting class member (or, perhaps more likely, a group of objecting class members who have pooled their resources) to make the showing that she (or they) should be permitted to intervene in the case for the limited purpose of making and pursuing her (or their) objections to the proposed settlement.[15] Limited purpose intervention of this sort was approved by this Court in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

This is *not* to say that the Rule 24 intervention process is a "pro forma" one in the context of a proposed settlement of a

[15] As discussed *infra* at p. 36 n.18, Petitioner's motion to intervene in this case was *not* one made in the normal course.

Rule 23 class action case, Pet. Br. at 38, or one that "produce[s] no benefit to class action litigation" in that context, *id.* at 40.

The reality of the matter is that objectors to class action settlements come in all different shapes and sizes: some retain legal counsel and make a substantial commitment of time, energy and resources to the process, whereas others do not retain legal counsel and are content to file a piece of paper containing some variant of "I object" or "This is a terrible deal." *See, e.g.*, JA 103, 117-26. Moreover, there is evidence of a practice in which "obviously 'canned' objections [are] filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests [on behalf of class members]." *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp.2d 942, 973 (E.D. Tex. 2000).

Given that reality, it is evident that the Rule 24 intervention process is not a "pro forma" one in the context of a proposed settlement of a Rule 23 class action case, but rather one that allows the district court presiding over the case in passing on a motion to intervene to distinguish between: (i) objecting class members who make a credible showing that in pursuing their objections they intend to act and are capable of acting on behalf of and in the interest of *all* class members who oppose the settlement; and (ii) objecting class members who do not make such a showing (or, worse yet, show that they are proceeding in an effort to extract a fee by lodging generic, unhelpful protests).

A requirement of intervention as a prerequisite to an appeal of a class action judgment thus serves the vital purpose of assuring that the appellant is a person who is proceeding in the interest of the class in initiating a proceeding in a higher court. In this regard, Petitioner could not be more wrong in asserting that "[i]n the court of appeals, the objector proceeds in his individual capacity rather than as a representative of the class as a whole and he has no obligation to pursue any

interest other than his own." Pet. Br. at 31. To be sure, some appeals in class action cases involve (in Petitioner's words, Pet. Br. at 31) "unique circumstances" with respect to the individual appellant, such as a claim of improper inclusion or exclusion from the class. But an appeal of a judgment approving a class action settlement on grounds of claimed unfairness to the class of which the appellant is a member—the situation presented here—will *necessarily* have a broader, class-wide impact: affirmance or reversal of the district court's approval of the settlement will by its very nature affect the class as a whole.[16]

In this way, the Rule 24 intervention process can provide a benefit that more than balances the minimal burden on the movants by furthering the very purpose of the Rule 23 class action process—*viz.*, to provide for the fair, efficient and manageable litigation of a civil case affecting numerous persons through parties who have the willingness and the capacity to proceed in a manner that takes proper account of the interests of those affected persons.

Plainly, Rule 24 intervention motions by objecting class members who make this showing should readily be granted by the district court. And, "denials of such motions are, of course, appealable. *See United Airlines, Inc., supra*[, 432 U.S. 385]." *Marino*, 484 U.S. at 304. Moreover, the Seventh Circuit undoubtedly is correct that when an appellate court upholds an objecting class member's appeal from the denial of intervention, it can and should go forward with a dispositive ruling on that class member's objections to the settlement itself. *See Crawford v. Equifax Payment Serv., Inc.*, 201 F.3d 877, 879-81 (7th Cir. 2000); *In re Synthroid*

[16] For this reason, the cases relied on by Petitioner involving the "wholly individual interests" of persons claiming to have been improperly included in or excluded from a certified class, *see* Pet. Br. at 31, are inapposite.

Marketing Litigation, 264 F.3d 712, 715-16 (7th Cir. 2001). Thus, an intervention requirement does not raise any prospect of multiple successive appeals, with its attendant costs and delay.[17]

III. PETITIONER'S INTERVENTION ARGUMENT

In the final section of his brief, Petitioner first seeks to raise the question of whether the District Court's denial of Petitioner's motion to intervene and the Court of Appeals' affirmance of that denial were in error, and then argues that these rulings were in error and should be reversed by this Court. In Petitioner's words, "[i]f this Court *does* hold that a class member must intervene in order to appeal, the [Fourth Circuit] judgment [affirming the District Court's approval of the settlement] nonetheless must be reversed." Pet. Br. at 41 (emphasis in original). And Petitioner's most succinct statement of his asserted ground for reversing the judgment below is that "if intervention *is* required, the [D]istrict [C]ourt erred in refusing to permit [P]etitioner to intervene limited to the right to contest and subsequently appeal the settlement." *Id.* at 13 (emphasis in original). *See id.* at 41-42 (developing this asserted ground for reversal).

But the question Petitioner would now raise is *not* the single question set out in the *certiorari* petition nor a question fairly included therein, and is therefore *not* a question before this Court.

[17] Given the availability of Rule 24 intervention upon a proper showing (and the availability of appellate review if a Rule 24 intervention motion is improperly denied), there is no reality to Petitioner's suggestion that application of the *Karcher/Marino* rule in the present context will "limit an objector's recourse to a likely futile objection at the fairness hearing required by Rule 23(e)." Pet. Br. at 35 (internal quotations omitted). Thus, the "due process" concerns raised by Petitioner on the basis of that suggestion are wholly illusory.

The Fourth Circuit judgment affirming the District Court's approval of the settlement rests on two entirely separate holdings disposing of two entirely separate "right to appeal" claims raised by Petitioner in that court.

First, the Fourth Circuit unanimously rejected Petitioner's claim that the District Court erred in denying his motion to intervene in the case, that the denial of his motion should be reversed and that he should be treated as an intervening party with the right to appeal from the judgment approving the settlement here. *See* Pet. App. A10-A14 (Part II of Court of Appeals' opinion), A30 (Michael, J., concurring in that Part II ruling).

Second, the Fourth Circuit held, by a divided 2-1 vote, that as a class member who presented objections to the proposed class action settlement after his motion to intervene had been denied, Petitioner lacked standing to appeal the District Court's approval of the settlement. *See* Pet. App. A14-24 (Part III of Court of Appeals' opinion), A30-34 (Michael, J., dissenting from that Part III ruling).

The Court granted certiorari in this case to consider the following *single* Question Presented:

> Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement? [Pet. i.]

On its face, this Question Presented is not addressed at all to the Fourth Circuit's first holding—*viz.*, that Petitioner was properly denied intervention and was not entitled to be treated as an intervening party with the right to appeal the District Court's approval of the settlement. Rather, the Question Presented is addressed solely to the issue that was the subject of the Fourth Circuit's second holding—*viz.*, that as a class member who objected to a settlement after his motion to intervene had been denied, Petitioner lacked standing to appeal the District Court's approval of the settlement.

Indeed, if there were any room for doubt, that doubt is eliminated by the sole grounds stated by Petitioner for granting his petition: (1) The Fourth Circuit had, by its decision, added its voice to a substantial, pre-existing "circuit conflict over whether *an objecting class member* has standing to appeal a district court's approval of a settlement," Pet. at 11 (emphasis added); and (2) The Fourth Circuit's disposition of that issue was (i) in conflict with this Court's precedents recognizing the right of certain persons interested in and affected by a district court judgment to appeal therefrom without intervening in the case, *see id.* at 16-19, (ii) in tension with the due process rights of objectors *qua* objectors, *id.* at 19-22, and (iii) unsound from a policy standpoint owing to the useful role that objectors *qua* objectors could play in policing district court approvals of class action settlements, and the unnecessary burdens of an intervention requirement, *id.* at 22-25.

Equally to the point, the *certiorari* petition contained *no* argument, or so much as an intimation, that adequate grounds existed for a grant of *certiorari* on the separate question of whether Petitioner had improperly been denied intervention in the first instance and had a right to appeal the approval of the class action settlement as a person determined by an appellate court to be an intervening party.

Rule 14(1)(a) of this Court's Rules provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." And, this Court has repeatedly and consistently enforced that Rule, including most recently in *Owasso Independent School District v. Falvo*, 534 U.S. ____, 122 S. Ct. 934, 938 (2002), and *Toyota Motor Manufacturing, Inc. v. Williams*, 534 U.S. ____, 122 S. Ct. 681, 694 (2002). Petitioner does not cite any ground for a

departure from that Rule here—indeed, he fails even to acknowledge the Rule's application to the matter at hand—and there is none.[18]

[18] In his brief, Petitioner does attempt to work around Rule 14(1)(a) by suggesting that the Fourth Circuit's unanimous decision upholding the District Court's denial of intervention is predicated on a far-reaching, general statement of the law of intervention in the class action settlement context that "makes no sense" and "invites a deluge of protective intervention motions." *See* Pet. Br. at 42.

But the reality of the matter is that the denial of intervention here was firmly and soundly based on a confluence of highly unusual facts and circumstances unique to this case. Among other things: (i) Petitioner originally had been designated by the plaintiff trustees as the named class representative for the defendant retiree class, but had declined to serve in that capacity; (ii) Against the background provided by his subsequent litigation actions, Petitioner's stated reasons for declining to be the named representative party were not credible and cast reasonable doubt on Petitioner's capacity as an intervening party to proceed in a manner that furthered the interests of the class; and (iii) Instead of moving promptly for intervention upon the dismissal of his parallel Second Circuit action against the trustees, Petitioner wrote not one but two letters to the District Court asking the Court to make him a party, and then five months after his Second Circuit case's dismissal sought to intervene not only, or even primarily, to make objections to the class action settlement, but rather to litigate the case by, *inter alia*, filing motions for a preliminary injunction against the trustees, to strike evidence, and to disqualify class counsel. *See* JA 151-54 (District Court decision denying intervention); Pet. App. A10-A14 (Court of Appeals decision upholding that denial).

Quite aside from the fact that the ruling on Petitioner's motion to intervene was entirely case-specific, recognition of such an after-the-fact suggestion of certworthiness as a way around Rule 14(1)(a) could only serve to undermine that Rule's purpose and utility. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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